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In the Supreme Court of the United States

HENRY MONTGOMERY

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF AMICUS CURIAE OF BECKY WILSON AND THE NATIONAL ASSOCIATION OF VICTIMS OF JUVENILE MURDERERS IN SUPPORT OF RESPONDENT

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STATEMENT OF AMICI CURIAE

This amicus brief is submitted by Becky Wilson and the National Association of Victims of Juvenile Murderers ("NOVJM").[1]

Becky Wilson is the daughter of Charles Hurt, the Baton Rouge Deputy Sheriff who was murdered by Montgomery. She joins this Brief to tell this Court how Montgomery's crime affected her and how revisiting that crime in parole hearings will be traumatic and unfair. Wilson believes that forgiveness is a personal issue—and she has forgiven Montgomery—and that people should pay the consequences for their actions. That societal interest should take priority over personal ones.

NOVJM is a national association, with 337 members from 235 families in 21 states, comprised of the families of victims murdered by juvenile offenders. NOVJM offers victims of violent juvenile offenders who have been tried and sentenced for their crimes a chance to make their voices part of the national discussion concerning the imposition of appropriate sentences, including sentences to life-without parole, on juvenile murderers and to provide

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

mutual support to each other as victims of the devastating acts of criminally violent teens. NOVJM also works to protect and preserve victims' rights through public policy advocacy at both the federal and state levels and by filing amicus briefs in cases that bear on victims' rights. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011 (2009).[2]

SUMMARY OF ARGUMENT

"No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey v. United States*, 401 U.S. 667, 691 (1971)(Harlan, J., concurring in part and dissenting in part).

Some 55 years ago, Petitioner Henry Montgomery, who was then 17 years old, shot East Baton Rouge Deputy Sheriff Charles Hurt to death. Notwithstanding the finality of his resulting conviction and the rejection of several petitions for collateral relief, he now seeks relief from his sentence relying on this Court's three-year old ruling in *Miller v. Alabama*. But making *Miller* retroactive will not make Montgomery's murder of Deputy Hurt any less a crime. Nor does it enhance that truth-finding function of the trial process.

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[2] Since filing its amicus briefs in *Miller* and *Graham*, the organization has changed its name. Then known as the National Association of Victims of Juvenile Lifers, it is now the National Association of Victims of Juvenile Murderers. While its official name has changed, NOVJM's purposes have not.

In addition, making *Miller* retroactive will deprive surviving family members of the finality that they have had for years. When a juvenile murderer killed their loved one, the surviving members were traumatized. Reopening these cases for resentencing will retraumatize them, forcing them to relive the events that traumatized them in the first instance. These surviving family members deserve no less respect than the juvenile murderers.

ARGUMENT

In its brief, NOVJM will address one doctrinal point before speaking to the interests of victims. It will first show how Montgomery's effort to apply *Miller. v. Alabama* retroactively on collateral review fails the test set out by Justice Harlan. Justice Harlan's analysis leads directly to the Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). The concerns that Justice Harlan outlined more than 40 years ago also put the rights of victims in context.

I. *Miller* established only a procedural rule that should not be applied retroactively.

A. The framework outlined by Justice Harlan in *Mackey v. United States* and *Desist v. United States* should guide the Court's analysis.

Before the Court's decision in *Teague v. Lane*, the question of the retroactivity of new rules of criminal law and procedure were governed by the standard in *Linkletter v. Walker*, 381 U.S. 618 (1965). That standard did not yield "consistent results." Teague, 489 U.S. at 302. In fact, as the plurality observed, "commentators have had a

veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'" Id. at 303 (quoting Beytagh, "Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1558 and n. 3 (1975)). Accordingly, the plurality jettisoned the Linkletter standard and adopted the tests for retroactivity on collateral review that are used today.

Those tests come from Justice Harlan's opinion concurring in part and dissenting in part in *Mackey v. United States*, and his dissenting opinion in *Desist v. United States*, 394 U.S. 244 (1969) As the *Teague* plurality "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review. 489 U.S. at 310. In this portion of their brief, amici will show how the views that Justice Harlan set forth more than 40 years ago still resonate.

In his 1969 dissent in *Desist*, Justice Harlan noted that "none of the Court's prior retroactivity decisions has faced up to the quite different factors which should govern the application of retroactivity in habeas corpus cases...." 394 U.S. at 260 (Harlan, J. dissenting). He began to set forth his thinking in *Desist*, and returned to that question two years later in *Mackey*.

In *Mackey*, Justice Harlan sought to ground the Court's approach to retroactivity "upon principles that comport with the judicial function, and not upon considerations that are appropriate enough for a legislative body." 401 U.S. at 677 (Harlan, J., concurring in part and dissenting in part). For cases on direct review, new constitutional rules should be applied to all cases because doing so

is consistent with the role of the courts and is fair to those already in the process. *Id.* at 677-81. In contrast, "The relevant frame of reference [for cases on collateral review], ... is not the purpose of the new rule, but instead the purposes for which the writ of habeas corpus is made available." *Id.* at 682.

Habeas corpus "has always been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not a substitute for direct review." *Id.* at 682-83 (emphasis in original). In order to make final judgments final, Justice Harlan proposed that "certain legal issues, whether or not properly determined under the law prevailing at the time of trial" should be excluded "from the cognizance of courts administering this collateral remedy." *Id.* at 683. He explained that, subject to "a few exceptions, ... it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation." *Id.* at 688-89.

The merit of the alternate view, that new constitutional rulings applied in all habeas cases, is "too easily overstated." *Id.* at 689. Given the pace of change in the criminal law, which can be attributable in part to the courts of appeals too, the system would be chasing its tail if all constitutional rulings were retroactive to cases on collateral review. That would conflict with Justice Harlan's belief that it is "a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process." *Id.* at 690.

Moreover, the failure to give finality its due "would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process." *Id.* at 691. Judges, prosecutors, and defense counsel would be forced to expend "substantial quantities of time and energies" to defend "the validity under present law of criminal convictions that were perfectly free from error when made final." *Id.* Justice Harlan explained:

> This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events have often dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id.

Accordingly, Justice Harlan explained, "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing." Id. at 693. Even so, his view that the scope of retroactivity on collateral review should be limited allowed for exceptions, and he set out two. The first was for "[n]ew 'substantive due process rules' ... that

place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe...." 401 U.S. at 692. The second was for "claims of nonobservance of those procedures that ... are 'implicit in the concept of ordered liberty.'" *Id.* at 693 (quoting *Palko v. Connecticut*, 302 U.S. 391, 325 (1937)).

In *Desist*, Justice Harlan pointed out the functions of the writ of habeas corpus. He explained that the first was "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." 394 U.S. at 262 (Harlan, J., dissenting). Another was to provide "a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 262-63.

Since 1989, the legal analysis of claims for retroactivity on collateral review has been governed by *Teague v. Lane*, 489 U.S. 288 (1989). There, a plurality of the Court "*agree[d]* with Justice Harlan's description of habeas corpus" and "*adopt[ed]* Justice Harlan's view of retroactivity for cases on collateral review." *Id.* at 308, 310 (Emphasis added.). Tracking Justice Harlan's *Mackey* opinion, the plurality addressed the exceptions to non-retroactivity. First, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in

part and dissenting in part)). Second, the Court "appl[ied] Justice Harlan's second exception that "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are implicit in the concept of ordered liberty' ... with a modification." *Id.* (quoting *Mackey*, 401 U.S. at 693) (Harlan, J., concurring in part and dissenting in part)(internal quotation omitted)).

The *Teague* plurality started to modify the scope of the second exception to non-retroactivity by limiting it to "watershed rules of criminal procedure." 489 U.S. at 311; see also *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)("This class of rules is extremely narrow....."). It noted "Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules" and addressed it by "limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. The plurality explained that those "accuracy-enhancing procedures" are those that are "central to an accurate determination of innocence or guilt." *Id.* "[S]uch rules 'are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.'" *Id.* (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982)).

In short, between *Teague v. Lane* and Justice Harlan's opinions in *Mackey* and *Desist*, the scope of

retroactivity in cases of collateral review is quite limited. *See, e.g., Saffle v. Parks*, 494 U.S. 484, 488 (1990) (*Teague* has "two narrow exceptions.").Only new substantive rules should be applied retroactively. Even then, a new substantive rule should not be applied retroactively unless it puts "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311. Second, a new substantive rule should not be applied retroactively unless it "alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Id.* (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)(emphasis added in *Teague*)). In *Teague*, for example, the Court declined to extend the fair cross section requirement applicable to the jury venire to the petit jury reasoning that the petit jury's lack of a fair cross section of the community did not mean that a "bedrock procedural element" was missing from Teague's trial.

B. Measured against these tests, *Miller v. Alabama* should not be deemed to apply retroactively to cases on collateral review.

Montgomery's claim does not fit within the exceptions to non-retroactivity. *Miller* does nothing to change the substantive law under which Montgomery was convicted; it does not make his 1963 murder any less criminal. Put differently, his actions remained "within the power of the criminal law-making authority to proscribe.'" *See Teague*,

489 U.S. at 311; *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part).

In addition, *Miller* does not establish a "watershed rule of criminal procedure." *See Teague*, 489 U.S. at 311.[3] This Court did not adopt a categorical rule that would bar the sentencing of juvenile murderers to life in prison without parole. Instead, it said only that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment" and expressly declined to "consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 or younger." 133 S. Ct. at 2464, 2469; *see also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)("[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."). As a result, a juvenile murderer is not "beyond the State's power to punish by [life-without parole]." Rather, a juvenile murderer can be sentenced to life-without-parole when the correct procedures have been followed and the trier of fact rejects the juvenile brain argument.

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[3] The United States agrees that Miller's "procedural component" does not establish a "watershed" procedural rule. Br. of United States as Amicus Curiae Supporting Petitioner at 5-6, 19 and n.8 ("Br. of United States"). Amici concur in that view, but disagree with the position of the United States with respect to the first exception to non-retroactivity outlined above.

II. The Retroactive Application of *Miller* Will Needlessly Trample on the Rights of Victims.

In his *Mackey* opinion, Justice Harlan wrote that subjecting final criminal judgments to repeated reexamination served the interests of "[n]o one, not criminal defendants, not the judicial system, [and] not society as a whole...." 401 U.S at 691 (Harlan, J., concurring in part and dissenting in part). In this portion of their brief, Wilson and NOVJM will explain how applying *Miller* in Montgomery's favor is not in the interest of the victims of juvenile murderers.

A. Montgomery's crime adversely affected the Scotlandville community and Deputy Hurt's family.

Montgomery's crime deprived Baton Rouge of a dedicated police officer who saw beyond race at a time when such vision was uncommon at best. In addition, it took a father away from a family, leaving behind a widow and three young children who struggled to make up for the loss. Applying *Miller* retroactively will force Wilson to revisit the traumatic results of Montgomery's crime.

Even Montgomery saw that Charles Hurt was "a very fine deputy sheriff." See Original Brief on Behalf of Appellant Henry Montgomery, Case No. 47,895, in the Supreme Court of Louisiana, at 5.[4] He was assigned to the Scotlandville community, which was majority black, because he respected and

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[4] Amici understand that the State of Louisiana has filed the record of Montgomery's trials and appeals with the Clerk and that this brief is included in this filing.

worked well with its residents. Hurt was different in that way because the Louisiana of the 1960's did not generally think that way. But, Deputy Hurt started a Junior Deputy program for male kids in the Scotlandville neighborhood.

Deputy Hurt displayed his respect for the African-American community in Scotlandville by assisting an illiterate mother whose son was serving in Vietnam. At her request, he would stop by her house and read her son's letters to her. He would then write her response to her son.

When Montgomery murdered Deputy Hurt, Hurt left behind a widow with three young children, one of whom was Becky Wilson. Becky was then 9, her brother was 11, and her sister was 6.

The loss of her father hit Becky Wilson and her family hard. It took a remarkable and positive father figure out of their lives and left the family struggling financially. Becky Wilson never heard a raised voice in her house before her father's death. In addition, she never heard him speak ill of any person because of their race or color.

With the loss of her father's influence, Becky Wilson and her family struggled. Neither her brother nor her sister completed high school in its ordinary time. Becky Wilson had a baby in high school and gave him up for adoption. It took her time to complete college, but she hung in and did it.

Now, Becky Wilson works at a community college in Arkansas. Every week, she works with a group of young people like those from the

Scotlandville community that her father did. She tries to encourage them to take responsibility for their actions and live in harmony with others in their community.

Charles Hurt did not get the chance to be a father to a family that needed him. He did not meet any of his grandchildren. He received few of the gifts and none of the satisfaction that comes from having a family grow up well.

Montgomery's actions took that away from Charles Hurt and from his family. The consequences that have followed are Montgomery's responsibility.

B. The harm and disruption that Becky Wilson suffered after Montgomery murdered her father is not atypical.

As stated above, NOVJM is composed of 337 members from 235 families in 21 states. It offers the victims of violent crimes committed by juvenile murderers the opportunity to add their voices to the national discussion about how to deal with juvenile murderers and the harm they cause. NOVJM's website (www.teenkillers.org) has a section of victim memorials that illustrate the disruptive effect on surviving family members. The stories of just two of NOVJM's members will illustrate those effects.

Maggie Elvey

In 1993, two juvenile gang members attacked Maggie Elvey's husband Ross. While one distracted him, the other beat him over the head with a metal pipe. Ross was closing his hardware store, and the

two were after guns. Ross spent 41 days in a coma before he died.

With Ross's death, the hardware store that supported the Elvey family had to close. Maggie and her children lost their home and their health insurance. One of her children turned to drugs.

Maggie writes that the murder left her "alone in what should have been our happy retirement years. I still have to work, and have lost my home and all savings, and am barely scraping by. Our children have never fully recovered from this trauma." See http://www.teenkillers.org/index.php/memorials/california-victims-2/ross-elvey (last viewed Aug. 27, 2015).

Jody Robinson

In May 1990, Jody Robinson's older brother was brutally murdered by a juvenile killer. Jimmy Cotaling was a car mechanic; one police officer whose car Jimmy worked on told her, "Jimmy has a passion for working on cars and that is what makes him good." The next time Jody saw that police officer was when he came to her family's house to tell them that Jimmy had been found dead in a vacant house. That day was May 12, 1990, and Jody Robinson, who was in her senior year of high school, was worrying about final exams and what to wear to the prom.

At trial, the medical examiner testified that Jimmy suffered 10 stab wounds and 16 incised wounds and that he suffered so many lacerations to his neck that he was almost decapitated. He suffered

numerous defensive wounds and his clenched hand contained hair that he pulled from one of his killer's head. Jimmy died for his car; the killers had stolen a license plate as part of their plan.

The news of Jimmy's death caused Jody Robinson instant heartbreak and pain. Even though she was 18 years old, she found herself crawling into her mother's bed at night because she was too afraid to sleep alone. By the time the case went to trial, Jody's mother was ill and in the hospital.

When the trial resulted in a guilty verdict and a sentence to life without parole, Jody's sister told her that the killers would never get out and hurt anyone again. Jody and her sister went from the court to the hospital where they found their mother clinically dead. Thus, at the age of 19, Jody Robinson found herself without her big brother and her mother.

Jody Robinson tried to move on, starting at a community college, but found she was clinically depressed. At the age of 22, she enrolled herself into an inpatient therapy program. By the time she was 25, she could remember the good times that she shared with Jimmy.

In 2010, one of the killers received a commutation hearing. Jody Robinson found this to be a re-victimization as she heard things that never came out at trial, like how Jimmy pleaded for his life, offering up his money and car keys, and how he fought to live. She felt like she was 18 again forced to relive the trauma. Her niece and nephew, who 4 and 6 when Jimmy was murdered, felt compelled to

attend the hearing, here they were forced to hear how their uncle died.

Jimmy Cotaling will never get the second chance that his killer seeks through the retroactive application of Miller. He will not have another chance to have and raise a family or to fulfill his dreams. Jody Robinson's children will never meet their uncle, and she won't have the chance to go off to college.

And, every time the radio plays Foreigner's "Hot Blooded," it brings tears to Jody Robinson's eyes. She and Jimmy used to sing along to that song, and it reminds her of how much she misses him.

The stories of Becky Wilson, Maggie Elvey, Jody Robinson, and countless others show the range of effects on surviving family members. The traumatic effects of the murder include effects on health, finances, mental stability, employment, and relationships. Survivors can find themselves unable to sleep or to concentrate at work. They can resort to therapy, including inpatient therapy as Jody Robinson did.

C. The rights of the victims of juvenile murderers deserve as much respect as the rights of juvenile murderers.

In this portion of their brief, Becky Wilson and NOVJM will address the neurological changes that follow from the murder of a loved family member. To the extent that *Miller* rests on a neurological understanding of the juvenile brain, the neurological

effects of those juveniles' actions are the other side of the coin.

In amici's view, the interests of the victims of juvenile murderers deserve at least the same respect that the juvenile killers receive. And, the interests of victims are a factor that counsels against the retroactive application of *Miller*. Forcing victims to attend parole and commutation hearings unfairly deprives them of the sense of finality that came with the verdict and sentence.

1. Neuroscience clearly shows that traumatic events like the murder of a loved family member affect the brains and lives of survivors.

As two professors of counseling and psychology point out, people respond to trauma differently. In some, "trauma becomes a negative, central defining moment in the[ir] ... lives, marking the start of entrenched emotional distress, maladptive behavior, and/or relational dysfunction." Bicknell-Hentges, L. & Lynch, J.J., Everything Counselors and Supervisors Need to Know About Treating Trauma (March 2009), paper based on a presentation at the 2009 American Counseling Association Annual Conference and Exposition, Charlotte, N.C., at 1-2. "[M]ost individuals experience temporary preoccupation and some involuntary intrusive memories." *Id.* at 2.

The preoccupation and intrusive memories flow from that fact that the murder of a loved one is unlike an ordinary stress. Its suddenness and the lack of warning force the surviving family members

to endure the unendurable. The resulting trauma is one that the survivors will have to live with.

That trauma changes their brains. Ordinary memories can be processed as they are created, but the traumatic memory cannot be processed as it comes in. Their brains cope by incorporating the trauma so that it makes some sense. But, because what happens is adaptation, not healing as one would from the flu, the brain is changed. And, whenever the surviving family member is forced to confront it (and, sometimes, when the memory recurs without being forced the surface), the brain is required to readapt.

2. Neuroscience is equally clear about the adverse effects of retraumatization.

Holding *Miller* to be retroactive will force surviving family members to confront their trauma again. Bicknell-Hentges and Lynch explain how "exploring traumatic memories [as the resulting resentencing hearings will do] can ... be damaging to some clients." Bicknell-Hentges & Lynch, at 4.

As Jody Robinson found, surviving family members have no choice about attending parole or commutation hearings. Hearings like those are the only place that they can make their voices heard. In doing so, however, they are forced to relive the traumatic events.

Victims are, thus, compelled to do something that hurts them and requires readaptation. The retraumatization that results from being forced to relive the traumatic events can cause the members

"to revert back to their original maladaptive response for dealing with the original trauma." Bicknell-Hentges & Lynch at 4. This may include regressing or reliance on self-medication to deal with the stress. *Id.*

The United States' insouciant minimization of the burdens of parole hearings overlooks the interests of victims. See Br. of United States at 22-23.[5] It is impractical for other reasons as well. In *Mackey*, Justice Harlan warned that retroactivity forces the State to "relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed." 401 U.S. at 691 (Harlan, J., concurring in part and dissenting in part). Just as witnesses, prosecutors, and judges may die, so do surviving family members.

Montgomery's claim presents this prospect in its clearest form. As Louisiana has noted, it is highly unlikely that any of the judges, prosecutors, or defense counsel in Montgomery's trial is still alive. Br. in Opp. at 33. The same may well be true of the witnesses. Id. at 34. Determining which "group of lawyers presents stale facts more effectively," *id.*, is hardly a sound use of judicial resources.

That is equally true for many of these old cases. As Justice Harlan observed, reopening these

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[5] Amici note that, while the United States finds a way to mention 42 criminal statutes that are likely unenforceable as written, *see* Br. of United States at 17 and nn. 6,7, it nowhere mentions the rights of victims under federal and state law. *See e.g.*, 18 U.S.C. § 3771(a) (identifying the rights of crime victims).

long final cases does nobody any good. Becky Wilson should not have to relive and reprocess a 55 year-old injury as requiring Montgomery to be resentenced would do.

Becky Wilson, Maggie Elvey, Jody Robinson, and the victims of other juvenile murderers have an interest in finality that deserves respect. They should get no less respect than that given to the juvenile murderers.

CONCLUSION

This Court should affirm the judgment of the Louisiana Court of Appeals.

Respectfully submitted,

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